ORIGINAL

Before the
Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Section 10 of the	)	
Cable Consumer Protection and	)	MM Docket No.
Competition Act of 1992	)	92-258
	)	
Indecent Programming and Other Types	)	
of Materials on Cable Access Channels	)	

To: The Commission

JOINT COMMENTS

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PARCABLE, INC.
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Summary

The Commission's Notice of Proposed Rule Making seeks comment on proposed regulations implemented pursuant to the provisions of The Cable Television Consumer Protection and Competition Act of 1992 that restrict access by children to indecent programming on leased access channels and enable cable operators to prohibit the use of "PEG" access channels for obscene programming. While the Companies commenting herein firmly believe that these statutory provisions do not pass constitutional muster, the Commission must nonetheless ensure that the proposed regulations are workable and fair. Accordingly, the Commission should adopt the following recommendations:

- define the relevant "community" for determining standards of indecency as consisting only of cable subscribers, or, in some cases, subscribers to a particular channel or tier.
- allow operators who "sequester" indecent programming on a single leased access channel to count that channel toward the allotment of channels that must be dedicated to leased access and require the programmer to bear any cost of blocking the channel.
- require programmers to notify operators whether or not programming contains indecent material in advance of channel use and in a specified written format.
- define how an operator's written indecency policy is published, and permit operators to require appropriate indemnification and insurance from programmers.
- establish as grounds for an operator's "reasonable belief" that programming contains

indecent material either a programmer's certification to that effect or a programmer's refusal to so certify.

- limit liability for operators who comply with the prescribed regulatory steps for obtaining programmer certification.

- require programmers seeking to air programs on "PEG" access channels to certify whether or not the program contains obscene material and limit operator liability.

- state that operators need not air a leased access program found indecent or obscene by a governmental body.

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To: The Commission

JOINT COMMENTS

Blade Communications, Inc., MultiVision Cable TV Corp., ParCable, Inc., Providence Journal Company,[1] and Sammons Communications, Inc. (hereinafter "Companies"), by their attorneys, hereby submit their Joint Comments in response to the above-captioned Notice of Proposed Rulemaking ("Notice"). Each of the Joint Parties is an owner and operator of cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

A. Introduction

The Cable Communications Policy Act of 1984 required cable operators to set aside certain channels for use by nonaffiliated programmers through noncommercial "PEG" access or commercial leased access.[2] These provisions, always of

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[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

[2] 47 U.S.C. §§ 531 and 532 (1988).

questionable status under the First Amendment[3], force cable system operators to carry programming against their own editorial judgment and without regard to the wishes or interests of cable subscribers.

The Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 (the "1992 Act"), grafts new requirements on the 1984 access provisions for the purpose of restricting the distribution of "indecent", "obscene" and other material over the access channels. The new provisions run even further afoul of the First Amendment, trampling not only on the rights of the operator, as before, but also now on the rights of the access programmer.

Despite the fundamental constitutional infirmities of the access provisions, the cable industry heretofore has accepted the obligation of providing access as part of its public interest responsibilities. These new requirements will make the burden of complying so difficult and the risk of liability so serious that the industry can no longer acquiesce in what has always been a highly questionable

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[3] The status of cable systems as first amendment speakers akin to newspapers is well recognized by the courts See Leathers v. Medlock, 111 S. Ct. 1438, 1442 (1991); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494 (1986); and FCC v. Midwest Video Corp., 440 U.S. 689, 707 (1979) Thus, the fundamental concept of mandatory access is constitutionally suspect. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) and see also Century Federal, Inc. v. City of Palo Alto, 710 F.Supp 1552, 1554 (N.D. Cal. 1987).

scheme. That the new statutory provisions raise significant new risks and burdens is evidenced by the fact that they were almost immediately challenged in the courts.[4]

Meanwhile, the Commission faces the perplexing task of adopting regulations to implement these difficult and legally precarious provisions. Until the statutory provisions that require these rules are declared unconstitutional -- which the Companies are confident they will be -- the Commission has no choice but to attempt to make something operable of a flawed and unfortunate situation.

In the Companies' view, there are measures the Commission can and must adopt if the regulations are to have any chance of being workable or fair. Outlined more fully below, these measures deal with: (1) defining the relevant "community" for purposes of applying the legal test for indecency; (2) the interface between the new requirements and existing access obligations; (3) notification procedures for programmer identification of indecent material; (4) the elements of a "written and published policy" for prohibiting indecent access programming; (5) the foundation for an operator's "reasonable belief" that an access programmer will use the channel to air material that is prohibited or

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[4] See Time Warner Entertainment Company, L.P. v. FCC and United States, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992); Discovery Channel v. United States, Civil Action No. 92-2558 (D.D.C. filed Nov. 13, 1992).

restricted under the statute; (6) reasonable limitations on operator liability; (7) provisions for PEG access; and (8) procedures for handling inevitable disputes.

B. Practical Problems Presented by the New Statutory Restrictions

The new provisions place the operator in an untenable position. Under the 1992 Act, as before, the operator remains in the contradictory position of keeping "hands off" access programming but having to answer to subscribers for what goes out on access channels. The new provisions only compound this dilemma by giving the operator the additional burden of restricting distribution of access programming that is "indecent", "obscene" or, for PEG channels, objectionable in other ways that are neither indecent nor obscene.

The frequency with which FCC and legislative attempts to deal with "indecent" or "obscene" programming are challenged and overturned demonstrates the difficulty of making essentially subjective determinations concerning program content.[5] It is easy to see how much more difficult it will

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[5] See, e.g. Pacifica Foundation, 56 FCC 2d 94 (1975), on reconsideration, 59 FCC 2d 892 (1976), rev'd, Pacifica Foundation v. FCC. 566 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) ("ACT I") (upholding FCC's indecency ruling in In re Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987), but vacating FCC's indecency ruling in In re Pacifica Foundation, Inc., 2 FCC Rcd 2698 (1987); In re Regents of the University of California, 2 FCC Rcd 2703 (1987)); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II")

(continued...)

be for an ordinary business person, caught up in the daily demands of running a cable system and without the expertise of a court or administrative agency, to assume this responsibility.

Furthermore, while the 1984 access provisions immunized the operator from liability for programming which the system legally could not control, the new provisions could subject the operator to liability if material later determined to be

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[5](...continued)
(invalidating FCC order barring all radio and television broadcasts of indecent material), cert. denied, 112 S. Ct. 1281 (1992); Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989) (upholding prohibition of obscene telephone messages, but invalidating prohibition of indecent messages); Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) ("Carlin I") (time channeling regulation restricting dial-a-porn invalidated); Carlin Communications, Inc. v. FCC, 787 F.2d 846, 855-56 (2d Cir. 1986) ("Carlin II") (dial-a-porn regulation invalidated because record did not show regulation was least restrictive means) and Carlin Communications, Inc. v. FCC, 837 F.2d 546, 560-61 (2d Cir.), cert. denied, 488 U.S. 924 (1988) ("Carlin III") (indecency statute upheld upon finding that "indecent" as used in statute was to be given meaning of "obscene" in Miller v. California).

Similarly, state legislation seeking to proscribe indecency and obscenity on cable television often has been invalidated. See Community Television of Utah, Inc. v. Wilkinson, 611 F.Supp. 1099 (D. Utah 1985) (state indecency law unconstitutionally overbroad and vague), aff'd, Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), aff'd 480 U.S. 926 (1987); Cruz v. Ferre, 571 F.Supp. 125 (S.D. Fla. 1983) (city ordinance regulating distribution through cable television of indecent material held invalid), aff'd, 755 F.2d 1415 (11th Cir. 1985); Home Box Office, Inc. v. Wilkinson, 531 F.Supp. 987 (D. Utah 1982) (state law making it a crime to distribute indecent materials by cable held unconstitutionally overbroad).

"indecent", "obscene" or otherwise subject to restriction finds its way onto the system. If an operator makes a good faith determination that a program contains "indecent" or "obscene" material and decides to prohibit it or restrict its distribution to a special channel, the system might face legal action by the would-be programmer for exceeding its authority under the Act. On the other hand, if the operator makes a good faith but erroneous determination that programming is not "indecent" and permits it to air on an unrestricted access channel, the system could face penalties for FCC rule violations. What is more, in the case of programming judged to be "obscene," an operator would be subject to civil and criminal penalties consisting of steep fines and even imprisonment. See 47 U.S.C. 558 and 559 (1988).

C. Recommendations

The Companies recognize that the Commission must go forward in adopting implementing rules, notwithstanding the pending challenges to the constitutionality of the underlying statutory provisions. Accordingly, the Companies offer the following suggestions and urge the Commission to adopt them in hopes of making the problematic scheme as fair and workable as possible.

1. Definition of "Community."

In the Notice, the Commission raised the issue of whether the definition of indecency should be the same for cable television as for other mass media. Putting aside the fundamental problems with any content regulation of this type, the Companies believe that it is not possible to devise another formulation of the subject matter portion of the current legal definition[6] that would be less objectionable.

With respect to another component of the legal indecency test -- how this subject matter is depicted -- cable definitely must be viewed differently than other media because receipt of cable programming is discretionary with the subscriber. Specifically, when confronting the issue of whether the material is portrayed in a "patently offensive" manner "as measured by contemporary community standards" in a cable context, the relevant "community" should, at a minimum, consist only of cable subscribers. In many cases, "community" should be further refined to include only subscribers to a particular tier or channel of service.[7]

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[6] Section 532(h) of the Act follows the Commission's current definition indecency: "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards. . ."

[7] Although viewing selections of specifically identified individual subscribers without consent is prohibited by Cable Act privacy provisions, 47 U.S.C. § 551 (1988), aggregate data is available and could be released to

(continued...)

The Commission already recognizes that cable subscribers need far less protection from obscene or indecent programming than do members of the general public.[8] Unlike programs broadcast on "free" TV or radio, which permeate the airwaves and often come into the home unexpectedly, cable programming must be affirmatively invited into the home through the viewer's act of subscribing to cable service. In addition, the subscriber has the option of buying only basic cable programming and foregoing other tiers, channels or even individual programs that might contain programming he or she considers objectionable. Furthermore, there already is federal legislation that requires cable operators to furnish cable subscribers with "parental control devices" or "lock boxes" to block off or restrict viewing of certain channels in their own homes. See 47 U.S.C. §544(d)(2)(A); 47 C.F.R. §76.11; 50 Fed. Reg. 18,655 (1985). Finally, a cable subscriber who finds cable programming in general "patently offensive" can cancel the subscription and still receive television programming off-air or through other delivery systems.

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[7](...continued)
provide evidence in a matter at which community standards are at issue.

[8] See Report of the Commission in MM Docket No. 89-494, 67 RR2d 1714, 1726 (1990) and Notice of Inquiry in MM Docket No. 89-494, 4 FCC Rcd 8358, 8364 (1989).

2. Interface Between Existing Access Requirements and the New Rules - Leased Channel "Sequestering":

The new statutory provisions require the operator to sequester "indecent" leased access programming on a separate, blocked channel if the operator does not opt to adopt and publish a written policy to keep such material off the system altogether. For systems that are not addressable, a decision to pursue this approach may take an entire channel out of play unless the operator is willing to undertake continuous truck rolls needed to insert or remove traps. Thus, from a technical standpoint, many systems must block off an entire channel, even if there is only one leased access programmer wishing occasionally to present indecent material. Moreover, it is unlikely that other access programmers would want their programming to be distributed on such a restricted basis. Nonetheless, the statute allows and even encourages operators to take this approach. It seems only fair that operators who opt to sequester such leased use should be able to count the blocked channel toward the allotment of channels that must be dedicated to leased access.[9] The Commission's regulation should clarify this point. In addition, the rules should provide for all costs of blocking and unblocking the channel

[9] Thus, for example, a 40 channel system, which must set aside four channels for leased access, could devote one of the four for sequestering possible indecent material and make only three others available for other commercial lessees.

(whether through encryption, individual subscriber traps or employment of special converters) to be borne by the programmer/channel user.

3. Notification Procedures for Programmer Identification of Indecent Programming:

The statute relies on notification by the programmer/leased channel user to identify programming that should go on the sequestered channel. Because there are potentially serious consequences for the operator who fails to restrict access by such programming, the notification process cannot be left open to misunderstanding. The Commission's regulations should require each leased access programmer to notify an operator of whether or not its programming contains indecent material in writing and in advance of the channel use.

For the first request for leased access of indecent programming on an addressable system, FCC rules should require notice to be given at least 45 days prior to the requested time of channel use, although subsequent users could give less notice once the scrambling mechanism was in place. For non-addressable systems, at least 45 days advance notice would always be required. The Companies anticipate needing at least that much time to arrange for placement of the program in question on a blocked channel. The Companies also encourage the Commission to include specific language

for the notice in the rules.[10] Although the Companies generally do not favor increased paperwork, they recognize that it would be advisable, in the event of disputes, to keep such notices on file for no more than a period of time sufficient to cover the applicable statute of limitations on actions. Finally, the regulations should make it clear that an operator is free to place programs on the sequestered channel and, in any event, shall have no liability and shall not be deemed to be in violation of the rules whenever that the programmer fails or refuses to provide timely written notification.

4. The Elements of a Written and Published Policy Prohibiting Indecent Programming

For situations where the operator chooses to adopt a written and published policy to prohibit indecent material from appearing on leased access channels, the Commission's rules should establish that the written policy is "published" if the operator: (i) makes the written policy available to users on request; (ii) places it in the public file; and (iii) furnishes a copy to the local franchising authority.

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[10] In other cable television matters, the Commission has provided suggested or required language for notices or contract provisions in an effort to enhance certainty and eliminate confusion. See e.g., 47 C.F.R. § 76.159 (required contract language for syndicated program exclusivity); 47 C.F.R. § 76.66 (suggested language for mandatory subscriber information concerning input selector switches and consumer education).

The rules also should provide that prior to furnishing a channel or channel time to a user for commercial leased access, the operator may require the user to provide appropriate indemnification, insurance or equivalent protection such as a letter of credit. Further, to avoid later misunderstandings, the rules should provide that the operator shall require a channel user to certify in writing that the programming will not contain prohibited programming, with the language of such certificate to be prescribed or approved by the Commission. [11]

5. Foundation for "Reasonable Belief":

The statute authorizes operators to prohibit presentation of leased access programming pursuant to a written and published policy if the operator "reasonably believes" the program contains indecent material. Although some operators may wish to engage in prescreening and should not be prohibited from or penalized for doing so, the Companies find (and believe that many operators also will find) such involvement both unacceptably burdensome and, given the difficulty of identifying "indecent" programming, unacceptably risky.

For the same reasons that Congress placed the burden on the programmer to identify and notify the operator of indecent content for purposes of channel sequestering, it is

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[11] See footnote 9, supra.

appropriate to rely on the programmer to play the same role when the operator elects to pursue the alternate course.[12] Thus, the rules should provide that either of the following constitute the foundation for the operator's "reasonable belief" that programming contains indecent material and grounds for keeping it off the system pursuant to the written and published policy: (1) a programmer's certification to that effect; or (2) a programmer's refusal to execute the required certification.

6. Reasonable Limits on Operator Liability:

The rules should make clear that an operator who complies with the regulatory steps for obtaining programmer certification has no liability for failing to air a program in circumstances constituting a foundation for "reasonable belief" that the programming contains indecent material. Further, the rules must enable operators to rely on the programmer certification that programming does not contain indecent material. Accordingly, the rules also should

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[12] The Commission previously has permitted cable operators to rely on third party certification in complying with children's advertising requirements. See 47 C.F.R. § 76.225; Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111, clarified on recon., 6 FCC Rcd 5093, 5097-98 (1991) ("We clarify. . . that the following types of documentation will also satisfy the record-keeping obligations. . . (2) certified documentation that the station and/or network/syndicator, as a standard practice, formats and airs identified children's program(s) within the statutory limits of commercials. . .").

stipulate that operators will have no liability for airing programming connected with a false or incorrect certificate.

7. Provisions for "PEG" Access:

The statute also raises the possibility of civil or criminal penalties on the operator should programming found to be legally "obscene" air on PEG access channels.[13] The rules should establish a programmer certification system identical to the one for "indecent" programmer to cover programming that contains obscene or other prohibited material. Further, as in the case of leased access, the operator should be entitled to require PEG channel users to provide appropriate indemnification and insurance. Finally, it should be made clear that an operator who relies on the certification system should have no liability for violation

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[13] It is noted that in some communities, the local franchise places a local, nonprofit board or access group in charge of scheduling and operation of the PEG channels. In the case of government access channels, local officials often are in total control. In some cases, these groups or officials provide their own studios and equipment for presenting access programming at a location separate and apart from the system. Programming is then relayed or otherwise delivered to the headend for distribution on cable. In these circumstances, the system operator may be precluded by local law from having involvement in any aspect of the operation of PEG channels. The Act allows for this. See 47 U.S.C. § 531(b) (franchising authority may require rules and procedures for the use of PEG access channels); 47 U.S.C. § 531(c) (franchising authority may enforce the requirements). The Commission's rules should take such situations into account by making it clear that the responsibilities of the operator and any potential liability passes to the entity that has assumed responsibility for administering the channel(s).

of the FCC rules and, further, should be immune from prosecution under federal, state or local obscenity laws.

8. Dispute Resolution:

For the reasons set forth above, disputes are bound to arise as operators attempt to meet the responsibilities imposed by the statute and the new implementing regulations. Ultimately, it will fall to the government -- either local officials, the Commission or the courts -- to resolve these disputes. It is essential that the rules provide that an operator need not air a leased access program if there is an outstanding governmental or court order, decision, finding or other ruling that such program is "indecent", "obscene," or otherwise restricted from being shown.

D. Conclusion

The access channels indecency provisions of the 1992 Act place cable operators in a fundamentally unfair position. The Commission's rules should be aimed at clarifying and limiting the role of cable operators in determining what constitutes indecent programming. In spite of the pending constitutional challenges, the FCC must consider thoroughly the consequences of promulgating regulations in this ill-defined area of the law. The Companies urge the Commission to adopt the recommendations set forth above. Only with the addition of the suggested clarifications and explicit

guidelines will the proposed rules function in a fair and consistent manner.

Respectfully submitted,

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